BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

REX W. HAFENSTINE	)	
Claimant	)	
	)	
VS.	)	
	)	
MURFIN DRILLING COMPANY, INC.	)	
Respondent	)	Docket No. 1,050,050
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 8, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met his burden of proof that he was injured while working for respondent and that his injury arose out of and in the course of his employment. Respondent was ordered to submit a list of three physicians to claimant for selection of one who would be his authorized treating physician, pay temporary total disability benefits beginning March 18, 2010, until claimant is released to substantial and gainful employment, and reimburse claimant for out-of-pocket prescription costs and medical mileage.

The record on appeal is the same as that listed in the ALJ's Order of July 8, 2010.

ISSUES

Respondent contends claimant did not sustain an injury or injuries that arose out of and in the course of his employment. Respondent asserts that claimant's need for treatment of his back and neck is a consequence of a congenital spinal deformity and

degenerative disc disease and that claimant did not prove his work for respondent aggravated his underlying preexisting conditions.

Claimant argues the evidence proved that he suffered a series of accidental injuries that arose out of and in the course of his employment with respondent and, therefore, the ALJ's Order should be affirmed.

The issue for the Board's review is: Did claimant suffer injuries in a series of accidents that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant testified that he has worked for respondent off and on for several years beginning in 1977. He said he restarted his employment with respondent on August 25, 2000. On the dates claimant is claiming injuries, from July 2007 through December 19, 2009, he was working as a driller, which is a strenuous job that included lifting, pulling, pushing, carrying, and reaching above his head. He also said that at times he would have to look in an upward position with his neck tilted back at about a 45 degree angle.

Claimant admitted that he did not have a single, traumatic accident at respondent that caused his current back and neck conditions. He does admit to having a work-related accident in 1993 or 1994 when he pulled on a joint of pipe and injured his low back. He said he reported the injury to respondent but did not receive workers compensation benefits. He testified that between 2007 and 2009, respondent had an oil leak on the inside of his unit, and the brakes would get coated with oil. Claimant said as a result, he had to push harder on the brake handle to slow it down, which caused his neck and back to hurt. But he is alleging a series of injuries as a result of his many strenuous work activities that have caused him to have pain in his low back that goes down his right leg. He is also claiming problems with his neck and said his neck hurt every time he looked up at a derrick hand. Claimant is also claiming numbness in his left hand and soreness in his right hand that goes up into the rotator cuff in his right shoulder, over to his neck, and down his back to his feet.

Claimant said his neck and low back worsened, and in December 2007 he started seeing Dr. Mark Steffen. Dr. Steffen referred claimant to Dr. Jonathan Morgan. Claimant first saw Dr. Morgan on December 1, 2009; he admits there is no mention in Dr. Morgan's medical note of that date that indicated claimant's problems were work related. Dr. Morgan reviewed the results of an MRI scan of claimant's low back that showed "evidence of congenitally short pedicles that appear to be contributing to spinal stenosis."[1] Dr. Morgan diagnosed claimant with multilevel spinal cord stenosis, and claimant underwent an L1

[1] P.H. Trans., Cl. Ex. 4 at 13.

through S1 decompressive laminectomy with fusion and placement of pedicle screws bilaterally at L1 through S1 on December 21, 2009. Claimant had bilateral upper extremity weakness below the elbows after the surgery.

By the time claimant saw Dr. Morgan on January 20, 2010, his left upper extremity problem had resolved and he had made progress with his right upper extremity. However, at claimant's March 17, 2010, appointment with Dr. Morgan, he was still complaining of upper extremity weakness, which Dr. Morgan believed was due to positioning during his surgery. An MRI performed on March 5, 2010, showed that claimant had a focal disc bulge at C5-6 and broad-based disc herniation with moderate to severe spinal stenosis and bilateral foraminal narrowing. Dr. Morgan diagnosed claimant with compression neurapraxia, particularly of the right extremity, and C5-6 herniated disc with moderate to severe compression of the spinal cord. Claimant was offered cervical spine surgery, and this surgery was performed on April 19, 2010. Claimant has been off work since December 20, 2009. In reply to a March 19, 2010, letter from claimant's attorney, Dr. Morgan opined that the repetitive trauma from claimant's daily work activities from November 2009 through December 19, 2009, "certainly would have aggravated/exacerbated existing [diagnosis]/disc herniation."[2] Dr. Morgan was asked further: "Is it your opinion, within a reasonable degree of medical certainty, that this patient's injuries are work-related?", and he answered "Yes--The work of being a roughneck certainly contributed to the progression of [claimant's diagnosis]."[3]

Claimant was seen on May 7, 2010, by Dr. Paul Stein at the request of respondent's attorney. Dr. Stein reviewed claimant's past medical records and performed a physical examination. He concluded that claimant had a history of neck and low back symptoms which were related to "degenerative disease and congenitally short pedicles which predispose to spinal stenosis."[4] Although Dr. Stein noted that oilfield work is fairly strenuous labor that can aggravate degenerative disc disease in both the cervical and lumbar spine, he could not state to what extent that was a factor in claimant's symptoms. He opined, however, that "the predominant causation for his symptomatology is the congenital anomaly in the pedicles, and the degenerative disk disease which would be expected to progress over time."[5] Dr. Stein further stated: "The cervical surgery does not appear to have been done primarily because of complaints of neck pain but because of the

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[2] P.H. Trans., Cl. Ex. 4 at 4.

[3] *Id.*

[4] P.H. Trans., Resp. Ex. 1 at 6.

[5] *Id.*

upper extremity symptoms. For this reason, I believe there is much less connection of the cervical surgery to any possible work aggravation."[6]

Claimant had been seeing a chiropractor from June 2002 through February 23, 2010. He first started seeing the chiropractor for problems with his neck. He also saw the chiropractor for low back problems. Claimant did not tell the chiropractor that his problems were caused or contributed to by his work for respondent. He said he did not think about discussing that with the chiropractor, although at the time he believed his work was causing some of his problems with his neck and back. Although the chiropractic records have not been introduced into the record, Dr. Stein's report indicates the number of visits claimant made to his chiropractor increased from 14 treatments in 2002 to 48 treatments in 2009. Further, Dr. Stein notes that claimant complained to the chiropractor of low back pain due to moving a refrigerator, moving a dresser, slipping while picking up a trailer hitch, and lifting a battery out of a car.

Claimant admits to some accidents that were not a result of his work at respondent. In 2003, claimant was injured when a car he was working on rolled off its blocks and fell on him, injuring some of his ribs. Claimant said he did not suffer injuries to his back in that incident. In 1999, he suffered a workers compensation injury to his low back when working for Uwasa, for which he received two steroid shots in the back. In 1990, he injured his back while working for the Kansas Department of Wildlife. He also had claims for carpal tunnel syndrome on the right while working for Sunflower Manufacturing and on the left while working at LaCrosse Furniture Factory. In March 2010, several months after his back surgery, claimant fell on his back when he was walking off his porch. Claimant said after the fall, his tail bone and right arm hurt. He did not go to the emergency room or see a physician as a result of the fall. Dr. Morgan's record of March 17, 2010, notes the incident and states that x-rays of claimant's lumbar spine showed excellent placement of the rods and screws and no evidence of any abnormality.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[6] *Id.* at 7.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a

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[7] K.S.A. 2009 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[13] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

ANALYSIS

The ALJ apparently found claimant's testimony to be credible because she awarded compensation based in part upon his testimony.

> The court is persuaded by the testimony of claimant and the medical opinion from Dr. Morgan and finds that claimant has met his burden of proof. Claimant has established that it is more probably true than not true that he was injured while working for the respondent and that his injury arose out of and in the course of his employment.[15]

It is important to note that Dr. Stein did not rule out claimant's work activities as an aggravating cause of claimant's low back and neck conditions. Instead, he merely discounted their significance in comparison to other factors, including claimant's congenital condition and prior accidents. But the test in Kansas is not whether the work caused the condition. Rather, the test is whether the work (series of microtraumas) aggravated claimant's preexisting condition or accelerated his need for treatment. Based on the record submitted to date, this Board Member finds that it has.

CONCLUSION

Claimant sustained personal injuries by a series of accidents that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 8, 2010, is affirmed.

IT IS SO ORDERED.

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[14] K.S.A. 2009 Supp. 44-555c(k).

[15] ALJ Order (July 8, 2010) at 2.

Dated this _____ day of September, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge